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IN THE

Supreme Court of the United States

OCTOBER TERM 1953

No. 723

ELIZABETH NOWINSKI, *Petitioner Pro Se,*

v.

RANDALL H. HAGNER & COMPANY, *Respondent.*

A Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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ELIZABETH NOWINSKI
Petitioner Pro Se

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In The

Supreme Court of the United States

October Term 1953

No. 728

Elizabeth Nowinski, *Petitioner Pro Se,*

v.

Randall H. Hagner & Company, *Respondent.*

A Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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The petitioner, Elizabeth Nowinski, *pro se,* prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above entitled case of January 27, 1954.

STATUTES INVOLVED

The 14 Amendment due process clause in Section 1.

District of Columbia Emergency Rent Act, see Title 45, Sec. 1605 D. ed. 1951.

JURISDICTION

Jurisdiction of the Court is confirmed by 28 U.S.C.A. 254 from the following points:

1. By writ of certiorari granted upon petition of any party to any civil or criminal case before or after judgment or decree.

2. There has been a violation of due process law guaranteed under Article 14, Sec. 1, of the Constitution.

3. Conflict between decision of Federal and State courts.

4. This case presents a matter of general public importance.

QUESTIONS PRESENTED

1. Whether petitioner had a fair trial as guaranteed her under due process clause of the Constitution.

2. Is due process satisfied by "lawyer of our own choice" and "day in Court," when petitioner was denied full and complete defense, or full disclosure of evidence as required by the Federal rules of procedure.

3. Whether there is a conflict between decision of U. S. Circuit Court of Appeals in the instant case and decision to the contrary in the New York State Court case of *State* v. *Arkow*, Magistrate Court. Decided July 30, 1953.

4. Whether this case presents a matter of general public importance affecting the rights of all of the people in the United States who play the piano.

ASSIGNMENT OF ERRORS

1. Failure of Court to give sufficient continuance.

2. Justice subordinated to personal matters.

3. Failing to interpret due process as guaranteed by the Constitution.

4. Question of the right in this modern era to enjoy oneself in an apartment in a normal fashion.

5. Failed to see the utter unreasonableness of the landlord's witnesses complaints.

6. "Day in Court," and "lawyer of choice," should not be the controlling factor in due process.

7. Insufficient testimony to sustain eviction.

8. Gross miscarriage of justice.

9. Trial Court departed from usual course of Federal procedure.

STATEMENT OF THE CASE

This was a suit by Randall H. Hagner & Company, agents for the landlord, for possession of an apartment No. 627 in Dorchester House, a building of 395 units in the Northwest section. It was brought under the Emergency Rent Act, in the Landlord and Tenant Court, Judge Barlow, presiding, on two counts; disturbance by playing piano and other noises and nuisance, the latter count later dismissed. On February 20, 1953, it was continued to May 7, May 27 and June 2. On that day the Court found for plaintiff on both counts. The appeal for new trial or verdict was denied and defendant appealed to the Municipal Court of Appeals. The Court affirmed the decision of the Trial Court (see Record for printed decision). A petition for allowance of appeal was filed on January 15, 1954, this was denied; reconsideration was asked for and this was denied.

FACTS AND ARGUMENT

The petitioner occupied an apartment in Dorchester House for thirteen years, from 1941 had the piano with her; that petitioner played piano for pleasure almost all her life, and after she moved in she continued to play in the same manner that she had before, consisting of almost daily practice and playing classical music. During these eleven years neither the management nor tenants complained. On the twelfth year the management apprised her of some complaints about the playing; that she was playing excessively loud, continually, and early and late. The evi-

dence and affidavits disclose that petitioner played normally and not in a manner to disturb normal people.

Evidence shows that one complaining witness, Bill Henry, tenant above had been compelled by the management to put a silencer on his teletype which he called a ticker device. He testified he was used to the noise of this machine and a city newspaper room, but claimed the piano playing disturbed him. Mr. Bratch, another complaining witness tenant above, began to complain as soon as he heard the piano, saying: "My God, a piano, they didn't tell me." He made twenty-four complaints to the management in about seven months. He also testified that the petitioner walked heavily, dropped things, moved furniture nightly, dragged furniture, and *sat at the telephone for some time.* Bratch, beginning January 18, 1953, testified from a record he kept of petitioner's playing. Exhibit 3. The evidence of adjacent tenants, Marcus and Eleanor Bell, in their affidavits state that the playing of the piano by the petitioner was normal, and in no wise disturbed their peace and quiet. Mr. and Mrs. Bell had lived in the adjacent apartment for five years. The facts disclosed that the piano was placed against their wall. The evidence and affidavits of witnesses Mallery, Krasner and Mr. Thurman Hill, attorney, living in closest proximity to the petitioner all stated that they were not disturbed.

For the petitioner, two witnesses, both pianists, one amateur and the other a professional, testified that they had visited the petitioner, observed and heard her playing and stated that it was normal. On two occasions when Mme. Rybier played there was banging on the walls. The wife of chief witness, Robert Bratch, wrote the petitioner a letter prior to trial thanking her for her cooperation, meaning that the petitioner was trying to cooperate to please the Bratchs.

The limited time allotted to petitioner to explore her defense, the single hour that the attorney settled for, to please the Court, was not enough to make a proper examination and defense; that it was impossible to get witnesses, abso-

lutely vital, who were not under subpoena, on short notice; and that there was not enough time for the Court to "obtain a full disclosure" as required by the rules of procedure. All these deficiencies were caused by the great hurry of the Court to finish the case.

On December 22, 1953, the respondent moved to vacate the stipulation in lieu of supersedeas and for a writ of execution producing two affidavits of former witnesses, Robert Bratch, tenant below in Apt. 527, and Bill Henry, tenant above in Apt. 727, petitioner's apt. 627, to the effect that: "Since the trial the petitioner continued to play the piano in a manner as *originally* complained of." To counter these charges the petitioner submitted her own affidavit to the effect that she was out of town July, August and September; on her return made an arrangement to play outside the apartment, and this is verified by the affidavit of Paul Robbins, and she played even less than the one to two hours she had been playing previously. The other affidavits presented to the Court from the adjacent and opposite neighbors, testify to the absolute baselessness of the assertions of playing as alleged, continuously, incessantly, excessively. This motion points up conclusively that the case is one which does not bear the test of truth and logic.

The innocent act of playing and practicing on the piano for pleasure and in normal fashion, up to two hours a day, sometimes less and sometimes not at all, has been made the subject of a breaking of a provision of the lease, alleging that the "noise" disturbed the tenants. As it is written it is a severe provision. It has been loosely construed in favor of the landlord and has not heretofore been adjudicated. It can be the subject of abuse as it was in this case the charges being unfounded.

For eleven years petitioner played and practiced the piano normally and reasonably and as a hobby and no objections were made by anoyne. Suddenly, on the twelfth

year, petitioner has become a violent person playing loudly, continuously, and excessively. In truth or in fact petitioner played from 30-40 minutes or one to two hours a day, at one time, or spaced. Witness Bratch said in one bit of testimony that she played three hours but he meant three times. Actually, it was one-half hour in the morning, one-half hour in the afternoon and one-half hour in the evening.

Denial of due process (R. 113):

Lane: May we approach the bench and confer with counsel?

Lane: They took me by surprise as to time. I am sure I will be able to get hold of my witnesses, but not knowing how long they were going to go I have not got them here. Could your Honor recess for lunch now. *My witnesses will be pretty long witnesses.* I don't want to drag it out.

Court: *I hate to turn you down Mr. Lane, but today is the Coronation and I have a group of people invited. I don't want to sit here all day.*

Lane: Could we just take a recess until one o'clock and I will try to get them in.

Court: Are they people that you could get easier than I could get for you.

Lane: Yes I would have to call them because they are not under subpoena, *just residents of Dorchester House* whom I want to put on the stand. I can get them by one o'clock.

Court to Frank: I suppose you are amenable as to this.

Frank: *Anything I can do to get it over with I am for.*

Counsel returned to the trial table.

Court: At request of counsel we will recess until one o'clock.

The petitioner is of the opinion and prays the Court to note it well that due process, as guaranteed by the Constitution, was not accorded me. I registered this protest imme-

diately in a statement addressed to the Landlord and Tenant Court:

> "I wish to call to the attention of the Court respectfully, Rule 9, Sec. B-c as to trial in the Landlord and Tenant Court. In part it says, 'The Judge shall conduct the hearing informally and in such a manner as to elicit fully all matters of defense and all facts in the case which will make him arrive at a just decision on the merits.' My contention is that all facts for the defense have not been fully elicited.
>
> "The plaintiff consumed a great deal of time from the beginning to the end by continuances and hearings. We waited about three weeks for one of their witnesses. The plaintiff's case closed very suddenly on June 2 at 12 o'clock. At the case was going we could not anticipate that it would end so soon. There were sworn witnesses of the plaintiff who were not called.
>
> "Therefore time was asked until one o'clock, to attempt to assemble the witnesses who were to have been ready on call. But the most important and vital to my cause were not available. These witnesses should be heard, in order that the Court may have the benefit of all the facts of the defense, and without which the decision cannot be considered just. Another ground is that one of these witnesses very favorable from the beginning suddenly changed his mind. The judge should also have the benefit of his testimony. He should have been subpoenaed as his statement was particularly important. And lastly, another ground is that the full story from me was not elicited."

It seems to the petitioner that the right of due process, as contemplated in the Constitution, is not satisfied by a parial hearing, which seriously affected the outcome. Also, the fault is not divisible; it is not necessary to put blame here and there. The fact is due process was denied petitioner.

With ample time to present all the facts of the defense there would be no conflict of evidence. The decision would have had to be in petitioner's favor. But the court had a pressing engagement and the petitioner's opportunity was curtailed. This was a serious departure of usual judicial

procedure, and responsibility for full disclosure of truth, *and not just a mis-step on the part of the court and is a reason for this court's supervision.*

Decisions as to due process appreciable:

In the case of *Mooney* v. *Holahan:* "Procedural due process, if not all that was originally meant by due process it is at least what is *uncompromisingly required.*" So I submit that the statement by plaintiff: "Having had a day in Court, and you had a lawyer of your own choice," should not be the deciding factor in the case. The Court in the above case further says: "Nor does it make a particle of difference from what source the act or omission complained of emanates, for it is not the act or omission, but its effect upon the hearing accorded by the Court to the defendant that results or does not result in denial of due process." *Mooney* v. *Holahan,* 294 U.S. 106, 107.

It is the duty of the Supreme Court to examine evidence to determine what might reasonably be found therefrom which would furnish a basis for the asserted Federal Right. *Carlson* v. *Curtis,* 234 U.S. 103-106.

The plaintiff sustained the burden of proof but wrongly and for the obvious reason that petitioner's testimony was not even partially in.

An opportunity to produce evidence under a proper examination with vital witnesses would have overcome these charges. The deficiency in this respect resulted in a verdict against me, which was wrong in its foundation. It was a denial of due process as guaranteed by the Constitution and for this reason I feel it certainly warrants a reversal.

CONFLICT OF DECISIONS

On the question of what is disturbance, there is the decision in the case of *State* v. *Arkow Magistrate Court, New York on July 30th 1953,* the decision: "In a novel case of first impression a New York Court held that the owner and user of a properly operating air conditioning unit which

emitted a droning sound similar in character and intensity to that commonly made by all such units, is not guilty either civilly or criminally of maintaining a nuisance, or of creating an 'unreasonably loud, disturbing and unnecessary noise,' under the administrative code of the City of New York. In so deciding the Court referred to the delicacy of balancing the right of one to use his own property as he sees fit and the right of society to be free from nuisances. Those living in urban communities must put up with some annoyances and disturbances. The Court opined that the steady droning of the air-conditioner was less annoying than the racing of engines, sounding of horns, conversations of passers by and crying and playing of children in neighboring apartments. A conviction in this case, it declared would not only ignore the way pointed out by firmly established principles in the law of nuisance, but would constitute a vain attempt to arrest scientific progress."

The decision of the lower court in the instant case exacted the extreme penalty, eviction. There was not even the question of compromise.

In *Albert* v. *Meadowbrook Swimming Club*, A. 197-149, where the music and dancing seriously disturbed the people in the neighborhood; they were enjoined by the decree and went on to say:

"The decree leaves the defendant free to use any effective method of so reducing the volume of sound from its property to the homes that they will no longer be disturbed.

"Everyone taking up his abode in the city must expect to encounter the inconvenience and annoyances incident to such a community, and he must be taken to have consented to endure such annoyances to a certain extent."

In *Eiber & Sullivan*, 75 A. 845, and again:

"If a man instead of contenting himself with the quiet and comfort of a country residence chooses to live in town, he must take the inconvenience of noise, dust, rats, flies, smoke and soot cinders, caused in the use and enjoyment of

his neighborhood property, provided the use of it is for a reasonable purpose and the manner of using it is such as not to cause any unnecessary damage or annoyance to his neighbors."

In this instant case the court held that the playing of a piano can be such a disturbance as to give a landlord the right of eviction; the New York Court makes much more sense. There is a further difference in the two cases. In the above cases cited, the defendant while enjoined was given the opportunity to make an adjustment and change conditions. In my case, although the piano had been muffled and restrained, so that only closing it altogether would be the next step, the Court exacted the extreme penalty, eviction.

PUBLIC IMPORTANCE

When such innocent enjoyment is attacked and condemned, it becomes a matter of public importance. The evidence did not sustain the allegation of abnormal disturbance through the "noise" of the piano. There is the decision in a New York Court on the matter of noise and discomfort which makes sense. In the instant decision it is bad from the point of view of public policy. It will prevent many people from playing the piano. It will affect about a fourth of the people in the United States for the piano is a favorite instrument and will destroy the endeavors and standards towards musical education in this country.

The ruling in the case is very harmful. No one would be able to play a piano, or radio, or television for fear of noises, or even operate a typewriter. Tenants will be made the subject of the whim of individuals. On this ground the decision should be reversed.

This is a case of first impression; it has some unusual aspects and would seem to be worthy of the consideration of the highest tribunal.

It was repeatedly stressed by the attorney for the opposition that since I am a member of the Bar I could have suggested to the lawyer what to do. I did receive a degree in law twenty-two years ago and was admitted to practice in Massachusetts, but having had no experience in law practice, was I in a position to "tell the lawyer what to do"? After the decision in the Municipal Court of Appeals I began to handle the case in *pro se*.

In *Bayless* v. *U. S.*, 220 F. (2d) the court said: "When the accused conducted his own case and appeal and brief were in *propona persona* all deficiencies will be overlooked and the court carefully will go over the entire record."

THE TESTIMONY

It is important to examine the testimony, for my contention is that the decision was won not on the merits of the case. I believe it is the duty of the Supreme Court to re-examine the evidence, despite the vehement contentions of the opposing lawyer that the facts must not be retried.

> "To the once inflexible rule that the findings of fact of a State Court will not be re-examined by the Supreme Court, two exceptions have been engrafted:
>
> "That the Supreme Court will reverse findings of fact as a result of a finding shown by the records to be without evidence to support it. These exceptions are as firmly established as the general rule and are stated more often than the general rule."
>
> *Cedar Rapids Gaslight Company* v. *Cedar Rapids*, 223 U. S. 665

And again, "In a case where it is asserted a person has been deprived by a State Court of a fundamental right" secured by the Constitution an independent examination of the facts by the Court is often required.

Craig v. *Harny*, 331 U. S. 367 at 373

The court by its own decisions has the power to review and evaluate the testimony. Denial of such examination

will perpetuate a wrong and unjust decision. A careful scrutiny of the testimony will cause it to fall of its own weight. The testimony is voluminous but does not stand the test of truths and logic.

The testimony of the plaintiff stands undisturbed, yet petitioner is confident a proper examination, and time to bring in my witnesses, would have demolished it. A few instances: Col. Sittersen above left to my apartment is too remote. He arrived in the apartment when I had already taken all measures possible to subdue the sound. Robert Rothstein lived in the apartment below mine from 1946-1950 and made no complaint; in 1950, when Felicia Rybier, a professional pianist, was playing, he banged on the wall.

Another statement of Rothstein: "In Summer when the sun rises earlier, she plays earlier. She plays one song over and over and beats her foot on the ceiling to keep time." This is nonsense! He is the one to whom I would say in meeting him in the building, to let me know, if at any time the playing bothered him; and he admitted this on cross-examination. As to Bill Henry, he has lived there seven years, with no complaint. Against expressed provision in lease, he had installed a teletype, otherwise known as a ticker device. When he was compelled by the management to remove it, he "wrote protesting vigorously that he wanted reciprocity from petitioner."

As to Bill Henry's statement that he talked to petitioner seven-eight-nine times, this is untrue.

Next we come to Robert Bratch. He was the instigator of the whole trouble. As soon as he moved in he began to complain about every little noise in the apartment upstairs. His testimony should be read and will show how he bristles as soon as the piano sounds.

The witness, Mr. Bratch, was disturbed in the playing of canasta, but this is not an accurate criterion for noise, and this applies as well to the frequent visitor who was a witness. If they are poor players they require greater concentration. Is a neighbor bound to adjust to his tempera-

ment? Is he the criterion of what is excessive and what is continuous? He also speaks about dragging furniture, sitting at the telephone for some time, dropping things, walking, here you have statements which he cannot prove. As to late playing, if it were true, would Mr. Bratch not have complained more than the twenty-four times he says he did, but he has not complained about such late playing as to keep him awake. His testimony shows an individual allergic and nervous to all sounds. He talks about banging, every noise is magnified to him. And when he says the petitioner plays scales for an hour and a half, it's ludicrous, for it is doubtful whether artists would do such a stunt.

The account of petitioner's visit to his apartment, a visit to see how further I could help the situation is distorted in its entirety and I had no chance to refute it.

The testimony of all witnesses does not stand the test of truth and logic. The Court finding is not right, the decision is wrong and unjust and should be reversed.

CONCLUSION

I have been playing the piano for many years, I am not a beginner that bangs out one jingle continuously. I play classical music on a Steinway, with a beautiful tone. Two hours is enough time at the piano for my purpose; classical music has restraint. It is not my fault that the tenant below is allergic to noise.

For the reasons stated in the previous pages, the Writ of Certiorari should be granted and I respectfully pray the Court to do so.

ELIZABETH NOWINSKI
Petitioner Pro Se

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In The

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October Term 1953

No. 738

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Randall H. Hagner & Company, *Respondent.*

Supplement to Petition

Elizabeth Nowinski
Petitioner Pro Se.

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In The

Supreme Court of the United States

October Term 1953

No. 728

Elizabeth Nowinski, *Petitioner Pro Se,*

v.

Randall H. Hagner & Company, *Respondent.*

Supplement to Petition

This supplement is filed in lieu of a brief and approved by the Clerk of the Court. This is the petitioner's third and last try in her effort to get justice. The record as it stands gives only one side; a decision in such case cannot be just and fair. With a proper examination she would have been able to show by witnesses, engagement book, music, etc., an entirely different story.

The petitioner had no way of knowing when she was told to step down from the stand that it was the end, and was not aware that the case was finished. Notwithstanding the fact that she had an attorney, he gave no more than ten minutes to direct the examination and did not elicit enough information to present her case properly. This and the Court's emphasis on personal matters certainly deprived

the petitioner of her true day in Court. If the petitioner had had a fair chance to present the case she could have shown and proven the testimony to be unfair, exaggerated and wrong.

She had given the utmost cooperation in a situation which was not wrong to start with, and testified that: "She did not want to be in any more trouble than she already was." Mr. Frank, attorney for respondent made something of this statement; but the fact is the petitioner was making every effort to avoid trouble before the trial and since. The idea of appeasement had no effect; there was no appeasing Mr. Bratch, the chief witness.

There is a long lease, in which there is no prohibition against a piano or piano playing reasonably and within certain hours. Petitioner kept the rules.

When the delegation came to tell the petitioner of the complaints, answering the specific charges of alleged excessive playing the instances were fresh in her mind she was able to show that Mr. Bratchs statements of playing 3, 4, 5 hours a day were either not true or grossly exaggerated, but their minds had already been made up. On this occasion they gave no instructions in regard to the use of the piano, and they made no mention of other "Noises."

R. 22. Further as the landlords attitude: Attorney Frank for the plaintiff said "You must remember your honor that the plaintiff is the landlord so the landlord can rely or base his case on the investigation as a result of complaints received by him." It would not have been difficult to make an investigation; the landlord could have produced his records to show complaints; the employees make reports; he could have put the nightwatchman on the stand to say whether on his rounds he heard playing to 12 o'clock at night coming from Apartment 627 or other noises such as moving furniture; the desk clerk would also be in a position to know. None of this was done. Did the landlord fulfil his duty to this tenant by accepting implicitly the

charges of the other tenants without an investigation on his own?

Is there anything in the record to show the good faith of the landlord. None of the adjacent tenants were disturbed. The witness Rothstein was not living in the building; the Colonels work at home was temporary and this has now ceased; the landlord did everything to appease Tenant Bratch and he was neither fair nor impartial in dealing with the petitioner considering the extreme penalty he asked for.

Another indication of a lease violation; under the same provision the petitioner is charged with having violated, is the clause "The lessee will not carry on any business therein." But witness Bill Henry in justification for his having a teletype in his apartment above petitioner and carrying on business there testified: R. 99 "Some of his friends in the Dorchester House also had ticker devices." If this is true does this show the landlord was impartial in his treatment of his tenants?

Bratch Testimony: R 3 "I moved into the apartment in August 1951 and the second week in September I began to hear noise." R. 4. "First noise I heard practicing on the piano, 15 to 25 minutes of running scales, running exercises, thumping of pedals. When that stopped we would have a continuous walking back and forth, dropping things on bare floors, dragging things." R. 6. "The noise were all the same continuous piano practice, pounding of pedals, heavy walking, dragging furniture. It is repetitious."

R. 6. "Since we first heard it from the 3rd week in August 1951 it continued with moderation until it worked up to February 22, 1952. That day was a holiday and we were both at home. She began about nine or ten in the morning continued through playing, through practicing, dragging furniture back to the piano back and forth sitting at the phone for some time during that period 2 to 2 and a half to three hours. It was a continuous operation of five and a half hours. Q. Was it a continuous performance?

A. Almost continuous with spasms of 2 and a half and three hours at a time. Another day he testified to was 10 months later November 8, 1952, and also December 25, 1952. A. "November 8 practicing began at 11 for 1 hour, at 3 for 1 hour; we went out and on return she played from 8 to 10 o'clock. We were unable to play canasta." A. "On December 25th practicing began at 10 for 30 minutes, 45 minutes at one time, one hour total three hours and 45 minutes." These three specific instances were given from memory. He then testified from a record he kept of petitioners piano playing as to time.

R. 29, 30, 31, 32. The elaborate story by Mr. Bratch of petitioners visit to his apartment is completely incorrect. He attributes language to the petitioner as would be used by a bobby-soxer. He said petitioner walked like a clod-hopper. Previous tenant said he was not bothered by any other noises other than the alleged piano playing. The whole testimony of Mr. Bratch shows that he is a person extremely sensitive to noise and in addition magnifies everything he hears.

R. 30. Mr. Bratch testified "Do you want to sit down and resolve this thing?" Can we all live in peace, or have you come down to fight about it?" What he said to petitioner was *"I don't believe we can resolve this thing."*

Mr. Bratch's testimony may be viewed further in the light of personal bias. He circulated a petition in person attempting to get signatures of tenants saying that they are disturbed, but they refused to sign much to his displeasure.

The records of petitioner's playing kept by him are not accurate. Petitioner did not need to keep records; her goal was approximately 2 hours a day, not every day; and testimony or records to the contrary are untrue. Does the Court believe that two hours playing is a violation of the provision of the lease?

Witness Sittersen: He moved into the apartment above left in July 1952, 4 months after petitioner had been told about complaints. The piano was then closed, only the keys

were showing and all playing was done with soft pedal. R. 119. Yet he testifies: "On a number of occasions I heard the playing of a piano for considerable periods of time, during the day, sometimes in the evening, possibly some related noises, I would not be prepared to be more specific about it because I cannot remember certain details but I can remember the piano playing for long periods of time." R. 81. Q. What was the latest you have been aware of the noise at night?" A. "Well, it has been fairly late in the evening, we have gone to sleep with it going on." Could the playing be so disturbing? Is it possible that his hearing is so keen he can hear a piano muffled as above? The validity of his testimony must be further questioned when tenants much closer are not disturbed.

Witness Rothstein: R. 75. Rothstein on cross examination: A. "It was a very unusual occasion, I'm sure she was having a party of some sort." During the conversation she asked me do I not appreciate good music. "She was insulted." The fact is the conversation referred to the occasion when he knocked on the ceiling, and Madam Rybier was playing at 8 o'clock in the evening. R. 123. It was she who was indignant and insulted.

R. 138. The petitioner knew that he and his wife were students and it was conceivable that there might be times when they were studying or at exam time they would prefer not to hear the piano at such times, and later when the child was born the same. This is why she told Mr. Rothstein to let her know if at any time they wished to have the playing stopped and she always received assurances that it was "alright."

Witness Bill Henry: R. 88 has this to say: (he has lived overhead for 7 years:) "One thing that disturbs me is the continual practicing that goes on, a lot of scale playing and the habit of first playing a piece, stopping and starting over again. It begins with playing scales and that is not particularly pleasant to me. This is very disturbing to me where it continues indefinitely at least during the

periods I have been home." Q. Can you give us your estimate of the period of time during any one day that this will continue? A. Well, of course, it would vary for I am not always there in the morning, but I never heard it before nine o'clock in the morning, but I heard it quite frequently as late as nine or ten at night. *Recently I have not heard it at night.* I used to hear it a great deal some years ago.

This is not an accurate description, for that is not the modern technique of piano playing, and petitioner has complied with modern methods; also she is an advanced player as her testimony shows. R. 90. "As I say the only occasion I had ever written a thing about it was in a letter which I wrote to Mrs. Bennet (then Manager) when *I told her I was going to take the ticker out and I protested vigorously, as I did verbally a number of times that there ought to be reciprocity.* This statement was made after he was compelled to remove the teletype and it is the only time to petitioner's knowledge that he complained about the piano. It appears that Mr. Henry would not have objected to the piano if he had been allowed to retain the teletype.

CONCLUSION

The excerpts from the testimony perhaps are sufficient to show inconsistency, variability, etc., so that it cannot be accepted as reliable.

Under all the circumstances, the decision in this case must not be allowed to stand. If petitioner had had the opportunity to develop a complete defense she would have been able to disprove this testimony. She was deprived of a right. The Supreme Court can now rectify this wrong, by reversing the decision, and petitioner prays the Court for such a result.

Respectfully submitted,

ELIZABETH NOWINSKI
(Elizabeth Kaufman Nowinski)
Petitioner Pro Se.

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